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Supreme Court of the United States

OCTOBER TERM, 196

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*, *v.* ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*	No. 368.

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Judicial Court is reported at 206 N. E. 2d 403 (R. 120).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(2). The appeal is from a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered April 22, 1965, and from a final decree after rescript of the Superior Court of the Commonwealth of Massachusetts entered pursuant thereto. The judgment of the Supreme Judicial Court was entered April 22, 1965 and notice of appeal was filed June 21, 1965. Probable jurisdiction was noted by this Court on November 8, 1965.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First Amendment and the Fourteenth Amendment. The statutes involved are §§ 28C-28H of Chapter 272 of the General Laws of Massachusetts. They are set forth in the Appendix.

Questions Presented

The basic question on appeal is:

> Whether §§ 28C-28H of chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure," are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Within the foregoing basic question there are comprised, among others, the following subsidiary questions:

> *(a)* Whether the publication of a book is protected by the First Amendment if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California,* 354 U. S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.
>
> *(b)* Whether the publication of a book is protected by the First Amendment if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California,* 354 U. S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.
>
> *(c)* Whether the publication of a book is protected by the First Amendment if it is not patently offensive within the meaning of *Manual Enterprises, Inc.,* v. *Day,* 370 U. S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

Statement

Sections 28-C-28H of chapter 272 of the General Laws of Massachusetts establish a proceeding by which it may be adjudicated that a book is obscene, indecent and impure.[1] The consequence of the adjudication, under the law of Massachusetts, is the suppression of the book.[2] Appellee filed a petition seeking such an adjudication with respect to the book entitled "John Cleland's Memoirs of a Woman of Pleasure" published by G. P. Putnam's Sons. (R. 1). Pursuant to statutory provision, appellant intervened. (Appellee will be referred to as "the Attorney General", appellant as "the Publisher", and the book as *Memoirs*.) The Publisher interposed defenses resting solely on the proposition that the publication of the book is protected by the First Amendment.[3] The Superior Court rejected the Publisher's constitutional contentions, declared the book not entitled to the protection of the First Amendment, and adjudged it obscene (R. 117-118). The Supreme Judicial Court affirmed, the majority being "of opinion that *Memoirs* is not endowed with constitutional protection" (206 N. E. 2d, 403, 406; R. 124).

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[1] The second and third statutory adjectives will hereinafter be treated as subsumed in the term "obscene". See *Commonwealth* v. *Moniz*, 338 Mass. 442, 155 N. E. 2d 762.

[2] Section 28B of chapter 272 (the section immediately preceding those under which the proceeding was brought) provides imprisonment and fine for "Whoever . . . publishes . . . or distributes . . . a book, knowing it to be obscene . . . ." Section 28H provides that, if a proceeding such as the present one results in an adjudication that the book is obscene, then in any trial under § 28B the defendant "shall be conclusively presumed to have known said book to be obscene." Thus the question whether the book is obscene, as well as the question of scienter, can be litigated only in this proceeding and not in any subsequent criminal prosecution.

[3] The substantive invalidity of the statutes as applied to the book in question is asserted, but there is no issue of prior restraint or any other attack on the procedure established by the statutes.

At the trial a copy of the book was introduced by stipulation, and the Attorney General called one witness. The Publisher called several witnesses and introduced documentary evidence.

The following witnesses for the Publisher testified to the literary merit, historical importance and other values of the book: Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College; John M. Bullitt, Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

The Attorney General's witness was Dr. John E. Collins, Headmaster of the Newman Preparatory School. He testified that the book "lacks literary merit" (R. 13), and, over objection that the questions called for conclusions of law, that the book is "obscene" (R. 12), "would arouse prurient interest" (R. 13), is "hard-core pornography" (R. 14), and is "patently offensive" (R. 15).

The Publisher's witnesses were all highly qualified (R. 41-42, 53, 63, 70-71, 84). Their qualifications were not equalled by those of the one witness for the Attorney General (R. 16).

The Publisher also introduced documentary evidence. On the matter of value, there are essays by the critics J. Donald Adams, V. S. Pritchett and Brigid Brophy, in *The New York Sunday Times Book Review, The New York Review of Books* and the *New Statesman,* respectively, and an article in *Time* magazine (R. 24-40). Portions of these documents, and of the testimony, also relate to the matter of contemporary community standards, as do the newspaper clippings and the copy of *Life* magazine that were introduced.

The Publisher's president testified as to the character of the Publisher and the distribution of the book (R. 82-84).

The volume in question contains the Cleland novel, an introduction by Peter Quennell and a historical note by the publisher. For over two centuries Cleland's work has had a wide, though for the most part surreptitious, circulation (Ex. A, Introduction and Note)[4]. In 1963 it was finally given open publication by G. P. Putnam's Sons, a company that has engaged in a century and a quarter of distinguished publishing (R. 82-83). The distribution of the book in no way departed from the normal course of Putnam's distribution; its only unusual feature was the relatively large number of orders from universities and libraries (R. 83)[5].

The testimony of the Publisher's witnesses on the matter of value, and the documentary evidence, were to the following effect:

Memoirs is one of a group of works important in the development of the English novel. A single decade—the 1740's—saw the publication of Richardson's *Pamela* and *Clarissa,* Cleland's *Memoirs* and Fielding's *Tom Jones.* The works of that decade may be said to have developed the English novel in the modern sense, and *Memoirs* is very much part of the process (R. 85-87).

Memoirs is, of course, an erotic novel. It is at the same time a work of art—careful and gifted writing that suc-

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[4] The 1821 case of *Commonwealth* v. *Holmes,* 17 Mass. 336, apparently involves *Memoirs,* although it does not appear whether it was Cleland's original novel or one of the distorted variations of it; there have been many instances of reverse Bowdlerization in the history of the work (Ex. A, pages xvi-xvii). The report of the case indicates that the prosecution was based primarily on an illustration.

[5] The Library of Congress requested the right to translate the book into Braille (R. 83).

ceeds as a novel. Read as a whole, it creates an effect that is primarily literary (R. 42, 48-49, 53, 54, 64, 65, 72, 85-86). The style is excellent (R. 24, 28, 30-31, 34-35, 36-37, 42, 43, 72-73, 85, 87-88), but the literary merits of the book go considerably beyond the stylistic.

Memoirs is structured fiction that contains a "plot with a purpose" (R. 43, 54-55, 59, 64, 73). It is a "novel of education", that is, a novel in which the principal character learns from experience and develops and changes (R. 42-43, 55). She participates in the experiences that she narrates and then reflects and generalizes upon them (R. 42-43, 45-46, 67). This reflection results in her acceptance and advocacy of certain values and ideas—the worth of pleasure and the place of pleasure; prudence, moderation and a rational view of the world; and finally an affirmation of the superiority of sex-in-love to the merely lustful (R. 25, 28-30, 36, 42-43, 45, 46, 55, 64-70, 88, 92).

Cleland displays the high literary talent of imaginative projection (R. 43). There is skill in characterization (R. 25, 42-43, 45, 56-57, 64-65, 67, 85) and a gift for comedy (R. 55-56). The book shows an acute psychological insight that in some instances anticipates recently-accepted psychological principles. The narrator condemns sexual deviation and holds it up to scorn, and at the same time explains certain types of aberration with considerable perception (R. 29, 70, 73, 80-81, 92-93). Apart from its intrinsic merits, the novel has historical value, both because of the information it gives concerning its period (R. 25, 28-29, 34-35, 43, 53, 56, 71-72, 85-86) and because of the part it plays in the history of English literature (R. 28-30, 55, 56, 71-72, 85-88).

Summary of Argument

The majority opinion in *Roth* and *Alberts* set forth two tests by which to identify material, challenged as obscene, that may be said to lie outside the protection of the First Amendment. One is the prurient interest test, under which

the material in question must have a narrowly-defined predominant appeal, morbid and unhealthy; appeal to the sexual interest of the normal adult is not enough. The other is the social value test; the First Amendment guarantees free publication unless the material is utterly without social importance, and social importance resides in works of literary or artistic value, as well as in the expository expression of ideas. It is only in the area where the perimeters of the two tests intersect that publication may be suppressed. *Manual Enterprises* set forth a third constitutional requirement for the application of anti-obscenity statutes—patent offensiveness.

These tests operate independently, so that only a book that fails by all of them may be suppressed. *Memoirs* fails by none of them. It is not morbid or unhealthy in its appeal to the normal adult. Its candor is within the limits set by contemporary community acceptance of reading matter. It is elegant and decorous, the very opposite of the patently offensive. And, as is shown by the book itself and the other evidence in the record, it is a work that has worth. Apart from its intrinsic values, it occupies a significant place in the development of the novel, and has interest as social history. Its intrinsic values are considerable. It contains the insights into human nature, and the advocacy of ideas, that we expect of good novels; its literary merit is not confined to the excellence of the writing. The concept of hard-core pornography does not fit at all.

Books are entitled to a position of primacy among the forms of expression protected by the First Amendment. A book of demonstrated value, such as the one before the Court, cannot be suppressed without violating the Amendment's guaranties.

Argument

1. The tests are independent.

In its opinion in *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476, this Court formulated two independent tests by which it can be determined whether a book, challenged as obscene, is entitled to the protection of the First Amendment. One has come to be called the "prurient interest" test, the other the "social value" test. A third test, that of "patent offensiveness", was stated in *Manual Enterprises, Inc.*, v. *Day*, 370 U. S. 478.

Predominant appeal to prurient interest and patent offensiveness (both considered in the light of contemporary community standards) supply the outer boundaries of the general field to which anti-obscenity legislation relates. But within this general field another criterion is to be applied; the statutes can have a constitutional application only if the challenged publication is utterly without redeeming social importance. Thus a book found to have intellectual content or artistic merit or some other form of social importance may not be suppressed, regardless of what conclusion might be reached if the prurient interest test were applied by itself and without regard to value.

It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible. The weight of state court authority supported this view of the holdings of the Court even before *Jacobellis* v. *Ohio*, 378 U. S. 184, *Grove Press, Inc.* v. *Gerstein*, 378 U. S. 577, and *Tralins* v. *Gerstein*, 378 U. S. 576, were decided. See *Attorney General* v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328; *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957; *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 121 N. W. 2d 545; but *cf. Haiman* v. *Morris*, Sup. Ct. of Illinois, 1964, Docket No. 37276 (not reported and withdrawn by order

dated July 7, 1964), and *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713. After *Jacobellis* and *Grove Press,* the high state courts that had earlier rejected the view now accepted it. *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497; *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760.

Value is not simply a counterweight to prurient appeal; the process of decision is not a matter of measuring the quantum of importance against the quantum of prurience to see which predominates. Dominance is a factor only in the prurient interest test itself. The test of social importance is applied separately, and the presence of value assures the intervention of the First Amendment:

> "It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

That the values of expression need not be balanced against the dangers of appeal to prurient interest had been recognized in the high state courts as a necessary implication of *Roth* and *Alberts.* See *State* v. *Hudson County News Co.,* 41 N. J. 247, 265, 196 A. 2d 225, 235; *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165; *Attorney General* v. *Tropic of Cancer,* 345 Mass. 11, 19, 184 N. E. 2d 328, 333. Indeed, it is a necessary implication of the First Amendment itself, whose adoption embodied acceptance of the detriments entailed in free expression. See *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S. D. N. Y.)

In the decision from which the present appeal is taken, the majority, although it indicated recognition of the fore-

going (206 N. E. 2d 403, 406; R. 123), stated that whether there were three independent standards "need not be decided, for in our opinion Memoirs meets all the tests" (206 N. E. 2d 403, 406; R. 123-124).

We submit that the tests are independent. If the proposition is not involved here, it is only because, with all due respect to the majority below, its opinion was wrong at every point: *Memoirs* is a book that under each of the tests must be found to come within the protection of the First Amendment.

2. MEMOIRS IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE PRURIENT INTEREST TEST.

When this Court, in *Roth* and *Alberts*, formulated the prurient interest test, it was not engaged in the simple exercise of synonym-swapping. Most earlier efforts to give meaning to the term "obscene" had ended by doing no more than replacing one epithet with another. "Obscene" was defined as "lewd", "lewd" as "lascivious", "lascivious" as "libidinous", "libidinous" as "licentious" and "licentious" as "lustful". "Immoral", "improper" and "impure" were tried, along with "indecent", "filthy" and "vulgar". The succeeding definitions had different trim, but no functional change, and the troublesome vagueness persisted.

In the last decade, however, it has been held that the matter must be considered in a constitutional context, and in that context *Roth* and *Alberts* dispelled a great deal of the vagueness. The Court chose a word that had not been prominent in earlier formulas—the word "prurient". It was a word whose peculiar connotations set it apart from its predecessors. The choice, of course, was not mere rhetoric. The purpose, we suggest, was to make it clear that the *Hicklin* test and its derivatives were no longer the law, and to define more narrowly and with greater depth the characteristic that must be found in the material upon which anti-obscenity statutes may operate.

The fact that a publication might appeal to the sexual interest of the reader, or might create a sexual response in him—the fact that the publication might, under the older definitions, be called lustful—would not satisfy the new and narrower prurient interest test. The etymological source of "prurient" is a word that means "itching", and its present-day connotations include "dirty", "nasty", "morbid", "unwholesome". Shortly before the date of *Roth* and *Alberts*, the word had been used in the American Law Institute Model Penal Code. The Code defined "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion", and again as "an exacerbated, morbid or perverted interest". (A. L. I. Model Penal Code, Tentative Draft No. 6 (1957), Section 207.10(2), pages 10, 29, 37.) The Code and its Comment are referred to in the *Roth* and *Alberts* opinion.[6] Thus the Court's selection of the word "prurient" marked the abandonment of older definitions that had been laid down without regard to constitutional requirements. Subsequent decisions of the Court confirmed the proposition that expression may not be deemed unlawful merely because it may produce normal sexual response in a healthy adult. *Jacobellis* v. *Ohio*, 378 U. S. 184; *Mounce* v. *United States*, 355 U. S. 180; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 352; *Times Film Corp.* v. *Chicago*, 355 U. S. 835.

The Court's narrow definition of the material that might be proscribed conformed with—indeed was required by—the realities of our culture. A legislative attempt to do away with books on the ground that they may be sexually stimulating becomes ludicrous when viewed against what we see around us. An eighteenth-century novel, no matter how much devoted to the act of sex, can hardly

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[6] We do not cite the American Law Institute as authority; non-judicial comments that preceded the decisions of this Court on the interrelation of the First Amendment and anti-obscenity legislation are hardly authoritative. We cite it rather as confirming evidence of what was denoted by the particular word that the Court selected.

add to the constant sexual prodding with which our environment assails us. Apart from the evidence offered, the Court may take judicial notice of the fact that our advertising, our motion pictures, our television and our journalism are in large measure calculated to produce sexual thoughts and reactions. We live in a sea of sexual provocation.

These aspects of our society may well be deplored, but they are part of the contemporary culture within which, as this Court has held, cases like the present one must be judged. Surrounded as we are by strong and manifold stimulants to our sexual instincts, we cannot bring the force of law to bear upon the publication of a book on the ground that its effect on a reader may be that of "arousing lustful desire".[7]

Nor do the references, in the prurient interest formula, to "the average person" and to "contemporary community standards" imply a broader brush of condemnation. The theme of the portion of the *Roth* and *Alberts* opinion in which the prurient interest test is stated is the final rejection of the *Hicklin* rule (354 U. S. 476, at 488-489). *Hicklin* had notorious weaknesses: (*a*) it stressed isolated excerpts of the book in question; (*b*) it judged those excerpts by their effect on the particularly susceptible, and (*c*) it looked to fixed concepts of propriety, regardless of time, place and circumstances. The courts that refused to follow *Hicklin,* as the *Roth* and *Alberts* opinion says, (*a*) considered the book as a whole, (*b*) judged it according to its effect upon the normal adult rather than upon the particularly susceptible, and (*c*) stressed current mores and reading habits as distinguished from the notions of propriety entertained by British judges of the mid-nineteenth century. This Court's use of the term "average person" was designed to remedy the second weakness of

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[7] *Commonwealth* v. *Isenstadt,* 318 Mass. 543, 550, 62 N. E. 2d 840, 844, (holding Lillian Smith's *Strange Fruit* obscene).

the *Hicklin* rule, and the use of the term "contemporary community standards" was designed to remedy the third.

The "average person" is the subject whose responses are involved; he is not the arbiter whose views on publication are to decide the constitutional question. The Court's repudiation of the *Hicklin* doctrine did not permit its replacement with a rule by which an "average" notion of what is objectionable should control the freedom to write and be read. Such a rule would forbid dissent in matters of taste, and would impose a tyranny no less repugnant to the constitutional guaranties than that imposed by *Hicklin*. It would be a direct contradiction of the Court's declaration that "All ideas . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . ." (354 U. S. 476, 484).

The negation of the *Hicklin* test expressed in the phrases "average person" and "contemporary community standards" does not mean that the rights guaranteed by the First Amendment are to be determined by conducting a Gallup poll among the population at large. The phrases were not meant to limit writers and publishers to the average person's conception of the kind of writing that ought to be published, or to limit a minority of readers to the kind of reading that a majority might think good for them. Where a statute purports to control general publication, the reference to "the average person" excludes as criteria the possible responses and attitudes of special elements of the population. (A less intrusive statute, which might, for example, regulate sales to children, is to be distinguished from a statute that suppresses publication altogether.) The reference to "contemporary community standards" fixes attention on the historic fact that standards change. The Court was not seeking to chain creative minds to the dead center of convention at a given moment in time.

It is thus the kind of appeal which the work has for the normal adult that is involved, and for purposes of the test the appeal must be one that will excite morbid and unwhole-

some interest. (Modern psychology confirms what observers of human nature have long known: that the average person includes, in the spectrum of responses of which he is capable, responses that are morbid and unwholesome.) Stimulation of a normal sexual response is not enough.

It could not, on any rational view of things, be enough. If the construction of the prurient interest test were otherwise—if a work's predominant appeal to a normal sexual interest were crucial—much of the greatest traditional art would fail the test. Consider the man of average sensuality, and average education in the visual arts. What, for him, is the predominant appeal of the works, say, of Rodin? Will he admire what the cultivated student of art finds to admire (*inter alia*) in the sculpture?[8] Or will he admire, and be stirred by, the woman he sees in the bronze?[9] Contemporary painting and sculpture would be less likely to fail the test—since bewilderment is likely to prevail over desire, if desire is at all involved—but the response of the average man to traditional art will often be predominantly, if not exclusively, a sexual response.

The tests of *Roth* and *Alberts* were applied in the case involving *Lady Chatterley's Lover (Grove Press* v. *Christenberry,* 175 F. Supp. 488 (S. D. N. Y.), aff'd 276 F. 2d 433 (2 Cir.)). The sexual passages in *Lady Chatterley's Lover* may fairly be said to be more stimulating than those in the present book. Certainly they speak more directly to twentieth-century readers. From this point in time, *Memoirs* may seem more quaint than lustful, and *Lady Chatterley's Lover* has an immediate impact that can hardly be found in the erotic minuets performed by Cleland's eighteen-century characters. Moreover, the forbid-

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[8] *Inter alia,* because the student of art may himself be assumed to be a man of normal sexual instincts. See Sir Kenneth Clark, 1953 Lectures at the National Gallery of Art, reprinted in Clark, *The Nude* (Doubleday Anchor 1959), especially page 29.

[9] For example: *The Metamorphoses of Ovid; The Eternal Idol.* Or in marble: *Danaïd; The Kiss.*

den words are used in *Lady Chatterley's Lover*. Nevertheless, the District Court and all three judges of the Circuit Court of Appeals found the book not obscene under *Roth* and *Alberts*.

With respect to contemporary community standards and customary limits of candor, the record contains both testimony and documentary evidence (R. 25-26, 39-40, 65, Exhibits B-I (not printed)). They show that *Memoirs* does not go beyond the limits of writing that is today reputably published and commonly accepted. It is not necessary to compare *Memoirs* with the obvious trash that we see on our newsstands. Our most popular magazines—publications that no one would think to condemn as prurient—all contain material, in pictures and in text, that arouse sexual impulses. Nor do we suggest that because one publication is sold without prosecution, another necessarily may be. The point rather is that the publication by reputable publishers of works that deal with sex in a given degree of candor, and their acceptance by the general reading public, establish community standards for reading materials.

The newspaper clippings and the magazine that are in evidence illustrate the broad range of public tolerance toward what they read. Newspapers and magazines, at about the time of the publication of the book in question, gave the public daily descriptions of the prostitution, orgies, lesbianism, voyeurism, flagellation and other sexual excesses that were disclosed in the Profumo affair. It can hardly be maintained that what may be presented as present-day fact to the entire public may not be presented as two-hundred-year-old fiction to the book-buying portion of the public.[10]

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[10] The illustrations in the exhibits add a dimension that the book in question lacks. It is reasonable to assume that the women pictured, in the eyes of the average man, are physically appealing. The full-color photographs of Christine Keeler that appear in the copy of Life magazine, for example, are hardly calculated to make sin unattractive.

Memoirs, of course, has erotic interest. It is a book about sex. But the interest of its heroine-narrator in sex is not "shameful or morbid". Neither is the interest of the normal adult reader of the book (R. 25-26, 28-30, 31-32, 33-35, 37-40, 92-93). Fanny Hill's attitude toward sex is honest and essentially innocent, not leering or dirty. There is none of the solipsism that is characteristic of the trashy sex novel; Fanny is keenly aware of, and tells us about, the personalities and characters of the human beings that she encounters. Her appreciation of sex is natural, not sick or perverted. Aberration is rejected and denounced. The book is directed toward life, not toward morbidity.[11]

The majority's discussion of its application of the prurient interest test to *Memoirs* is, in its entirety, as follows:

> "We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which 'goes substantially beyond customary limits of candor in describing or representing such matters.' " (206 N. E. 2d 403, 405; R. 122.)

From the catalog of episodes one may perhaps infer that it is the presence of aberrations that influenced the court.[12] We submit that the itemization does not constitute an accurate description of the book. The principal sexual interest of *Memoirs* is a normal heterosexual interest, and,

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[11] The statement of the prevailing opinion of the Court of Appeals of Ontario, in holding *Memoirs* not obscene, is pertinent:

> "In my opinion, the book, read as a whole, has not about it that aura of morbidity nor that degree of suggestive pruriency which might render it obscene within the meaning of the Code." (*Queen* v. *S. Coles Co. Ltd.,* 44 Crim. Rep. 219.)

[12] It may be noted that the court's list is very similar to the summary above of the items contained in the Profumo newspaper reports.

as the witnesses pointed out, Fanny Hill extols the normal sexual relationship and scorns the deviant. Moreover, it is fundamental that no subject matter as such is excluded from the First Amendment guaranties; there is no thematic obscenity. See *Roth* v. *United States,* 354 U. S. 476, 487.

Possibly the crucial words in the quoted statement are "almost entirely". They suggest that the majority below based its conclusion on the amount of sexual material in *Memoirs.* But surely the extent to which a book deals with sex cannot determine the application of the test. One radical décolletage in a group chastely costumed will create more sexual excitement than a beachful of bikinis. If there is not that quality of essential nastiness and morbidity which identifies appeal to prurient interest, the quantity of sexual material in a book will not create it. Prurience is not a matter of arithmetic.

Earlier in its opinion, the majority below had stated: "The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection" (206 N. E. 2d 403, 404; R. 121). The statement is unexceptionable, but the opinion does not otherwise make a case for condemnation under the prurient interest test. With all the respect due a distinguished court, it would seem that, despite the disclaimer, the majority found *Memoirs* prurient because it found *Memoirs* erotic. But whatever the reasoning behind the majority's elliptical statement, the conclusion that it reached necessarily involves a departure from the prurient interest test as this Court has formulated and applied it.

3. Memoirs is entitled to constitutional protection under the patent offensiveness test.

The term "patent offensiveness" is given definition by the facts of the case in which it first appeared. Apart from the effect of the *Manual Enterprises* publications upon those "unfortunate persons whose patronage they were aimed at capturing" (370 U. S. 478, 490), it is apparent

from the descriptions of the publications (370 U. S. 478, 489-490, 526-527) that most adults would, as the Court did, recognize them for what they are. "Patent offensiveness", then, necessarily means something quite beyond a violation of standards of propriety or good taste. Not everything that the average person finds offensive can be called "patently offensive" within the meaning of *Manual Enterprises*. But, even if we were considering standards of taste rather than standards of constitutional law, Fanny Hill would do well:

> ". . . she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque." (Pritchett, R. 28.)
>
> "One is not unaware of the formal values of the work. I think that one's response is, in part, or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel, could be quite offensive. But I find it not offensive." (Sproat, R. 65.)
>
> ". . . in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncensored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's *Another Country,* nor are they as grubbily explicit as the climactic sexual passage in Updike's *Rabbit Run.*
>
> "Certainly Fanny was no common harlot. Her 'Memoirs' combine literary grace with a disarming

> enthusiasm for an activity which is, after all, only human. What is more she never uses a dirty word." (*Time,* R. 40.)
>
> "Mercifully *not* 'robust', or Rowlandsonian, [Cleland] is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose." (Brophy, R. 37-41.)
>
> "Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland than Miller." (Adams, R. 25.)

Elegance is the antonym of offensiveness, and the evidence of the witnesses and the documents confirms what is apparent from a reading of the novel—the absence of the gross, the presence of elegance. It is no answer to say that the underlying subject matter may be offensive to some; it is offensiveness on the face of the material that this test speaks of, and the underlying subject matter in *Manual Enterprises* must be kept in mind when the opinion in that case is applied.

"Patent offensiveness" may perhaps be found in a work such as *Tropic of Cancer,* a work entitled to protection for other reasons. But the term cannot appropriately be applied to *Memoirs.* Certainly erotic in subject matter, it is just as certainly, in its patent qualities, free from the extreme offensiveness that *Manual Enterprises* contemplates.

4. MEMOIRS IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE SOCIAL VALUE TEST.

In *Roth* and *Alberts* the statutes were attacked as unconstitutional *in toto* and there was no other issue. The majority accordingly undertook a comprehensive statement of the reasons why the First Amendment does not

protect obscene material, and this necessarily entailed a description of just what this unprotected material is.

The majority held that it has two characteristics. One is appeal to prurient interest, discussed above. The other is the complete absence of social importance. It is not every worthless publication, of course, that the statutes can affect; it must be a publication that appeals to prurient interest. Nor is it every publication considered prurient that the statutes can affect; it must be a publication "utterly without redeeming social importance." For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a Constitution that forbids abridgement of freedom of the press.

Laws affecting speech or writing have, of course, been held to have a valid operation in spite of the First Amendment guaranties. The *Roth* and *Alberts* opinion mentioned cases that had so held. They are cases in which the speech or writing amounted to conduct rather than expression, or was so entwined with conduct that the behavioral rather than the expressive aspect dominated.[13] Prohibitory laws might also operate where material is so utterly devoid of value that it need not be regarded as speech or writing at all.

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[13] *United States* v. *Harriss*, 347 U. S. 612 (disclosure provisions of the Federal Lobbying Act); *Breard* v. *Alexandria*, 341 U. S. 622 (municipal ordinance prohibiting peddlers from calling upon private residences without invitation); *Teamsters Union* v. *Hanke*, 339 U. S. 470 (state court injunction against picketing); *Kovacs* v. *Cooper*, 336 U. S. 77 (municipal ordinance against sound trucks emitting "loud and raucous noises"); *Prince* v. *Massachusetts*, 321 U. S. 158 (state statute prohibiting newspaper sale on the streets by minors); *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (coercion by employer under National Labor Relations Act; ". . . conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act" (p. 477)); *Cox* v. *New Hampshire*, 312 U. S. 569 (state statute requiring a license for parade); *Schenck* v. *United States*, 249 U. S. 47 (the "clear and present danger" test applied to a conspiracy to circulate materials influencing persons to obstruct a wartime draft). 354 U. S. 476, 484.

This last category provided both the constitutional justification for anti-obscenity legislation and, within the area bounded by the line of prurient interest, the constitutional definition of obscenity. Anti-obscenity statutes, the majority held, have a discernible, though severely limited, validity. Legislatures, in the pursuit of goals relating to prevailing concepts of immorality or offensiveness, may ordain suppression despite the strong language in which the First Amendment is cast. But they may do this only with respect to material that has no social value, and only because it has no social value.

The First Amendment, of course, has its principal function where the majority disapproves. Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing. On the other hand, it may be said of material utterly without value that it does not rise to the level of writing—that is, "the press"—within the meaning of the Constitution. Once obscenity is defined as that which has no value, then—and only then—room can be found in our constitutional structure for anti-obscenity legislation. The mark of suppressible obscenity inheres in the constitutional justification of the suppressive legislation.

The social value test supplied not only doctrinal validity but practical workability. The prurient interest test was itself a significant step toward clarity. The elimination of the spectacular weaknesses of *Hicklin* represented an important gain, and the word "prurient" provided some content and character where earlier formulas provided only amorphous deprecation. But the prurient interest test, standing alone, left the law to deal with these grave yet delicate questions in terms of judicial responses that must remain largely subjective.

The determination of whether the predominant appeal of a book is to prurient interest is a matter of direct and personal reaction. Evidence of contemporary community standards and customary limits of candor can give the

court a background against which to make its judgment, but there is no further aid to decision. No witness is an expert here, except with respect to that background, and any opinion he might offer as to the presence or absence of prurient interest would be a legal conclusion. There is the challenged book, and the key word, and the court must decide whether they match or do not match; there is nothing in between.

Social value, on the other hand, provides a criterion that can be objectively applied, and by a process familiar to the law. Judges and jurors are no longer committed to a total reliance on their individual responses. Traditional judicial techniques come into play. There is evidence to be considered.

We are now on familiar judicial ground. The courts have long dealt with questions of value, and there are time-tested methods at hand. One method by which value may be shown is in the testimony of those who may be qualified as expert in the field. Real estate experts, for example, give testimony in condemnation cases and in tax cases, and security analysts estimate earning power in corporate reorganization cases. Similarly, those who are qualified to speak about the particular values that a book is alleged to have can offer the court expert testimony on the point. There are among us individuals who, by training and experience, are better qualified than most to appraise the literary or artistic or other merit of a book. Their opinion testimony provides the material of decision.

Opinion as to value is quite different from opinion as to whether a book is prurient or not prurient, or obscene or not obscene; these words signal conclusions of law, which are the business of the court, not of the witness. Nor is the witness asked to state whether the book has that value which brings it within the protection of the First Amendment. The determination of that question is the province of the court, and the witness has only his usual function of supplying evidence upon which the court will act.

Another source of objective evidence as to value is documentary. Where there are book reviews, or critical essays, additional data can be presented to the court. The situation is analogous to those in which there are indications of value apart from the litigation, in the form of appraisals or otherwise, where economic value is in issue. There is this difference: where literary or scientific or artistic value is concerned, it is not alone the content, but the very existence of independent and respectable appraisals, that is meaningful. Writing which is "utterly without social importance" does not become the subject of sober critical consideration. There naturally will be differences of opinion about any given work, but the fact that there is serious discussion of the work, by recognized critics and scholars, published in established periodicals, is an objective fact of the utmost significance.

That the presence of value entitles a book to the protection of the First Amendment has been the law, we submit, since the date of *Roth* and *Alberts*. Most high state courts that considered the matter agreed, even before *Jacobellis* and *Grove Press* v. *Gerstein,* and those cases confirmed the proposition.[14]

In the present case there are both kinds of evidence. Respected critics have written about the book, and what they wrote is part of the record. In addition, there appeared in court, to face whatever rigors cross-examination might produce, distinguished faculty members from the colleges and universities of the Commonwealth of Massachusetts. Some assign the book a high place in the echelons of literature. Thus Pritchett feels that Cleland succeeded where D. H. Lawrence failed (R. 31). Holland ranks *Memoirs,* among eighteen-century novels, above Defoe's celebrated *Moll Flanders* (R. 72). Others do not rate the book so highly. But all of the witnesses and all of the documentary evidence agree upon the fundamental point: *Memoirs* is

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[14] See cases cited page 8 above.

a work of literature that has considerable value.[15] Its value is not confined to the excellence of the writing—although good writing is rare enough to make its suppression an act of social improvidence. Nor is it confined to other purely literary features, such as wit, structure, and characterization. *Memoirs* has, in addition, a notable degree of psychological insight, and ideas about manners and morals that are entitled to reflective consideration. Moreover, the book has historical significance, both for what it tells about the society of its time, and for the place that it occupies in the development of the novel.[16]

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[15] Even opposing counsel were impressed with the merits of the book. The Attorney General's brief to the Supreme Judicial Court stated (at pages 6 and 7) that the writing in *Memoirs* is "quite clever"; that there is "frequent use of highly colorful metaphor"; that there is no reason to disagree with the expert testimony to the effect that "the writing style is artistic"; and, in a sentence instinct with admiration, that there is "a comic flair to the writing that is inescapable". Contrast the statement of Chief Judge Desmond of the New York Court of Appeals on *Tropic of Cancer*. ". . . Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. . . ." (*People* v. *Fritch*, 13 N. Y. 2d 119, 126, 192 N. E. 2d 713, 718.)

[16] The Attorney General produced one witness in opposition. His opinions were not so much literary evaluations as legal conclusions. His concepts, moreover, differed from those of the courts; he stated that *Tropic of Cancer* is obscene (R. 19). His misuse of language, in view of his educational background, suggested an emotional commitment inconsistent with the requisite detachment of an expert witness. When asked what he understood by the word "prurient", he used the word "esoteric"; when asked whether that was the word he meant, he answered "Yes" (R. 16). He indicated that the word "disgusting" could be applied to no books other than those that have a sexual subject matter (R. 18). Further doubt is cast on his competence as a literary expert by his listing Jane Austen as an eighteenth-century novelist (R. 16). (*Sense and Sensibility* was published in 1811, *Pride and Prejudice* in 1813, and *Emma* in 1816.) Finally, he could not recall important aspects

(Footnote continued on next page)

The majority below gave the criterion of social importance only grudging acceptance, referring to it as "one other possible test" (206 N. E. 2d 403, 405; R. 123)—this despite the explicit affirmation of the test by the same court in *Attorney General* v. *Tropic of Cancer*.[17] It was perhaps a reluctance to concede the test's existence that led the majority below to falter in its application. There was plain error on the constitutional fact of the value to be found in *Memoirs*: the majority ascribed to the book only "some minimal literary value" (206 N. E. 2d 403, 406; R. 124). A publication might have considerably less value than the testimony and the documentary evidence show *Memoirs* to have and still rise above the level of "minimal literary value".

The majority below stated that the test does not require that a book "must be unqualifiedly worthless before it can be deemed obscene" (206 N. E. 2d 403, 406; R. 124). There is a question whether this can be reconciled with the principle that the obscene, in a constitutional sense, is only that which is "utterly without redeeming social importance", but the question is one that need not be reached. The considerable evidence of value in *Memoirs* renders *obiter* any exploration of the outer reaches of what the social value test protects. The present case does not involve any iota or scintilla theory of social importance.

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and events of the book about which he was testifying (R. 21). Although he said that he had read it on the night before the trial (R. 19), he could not remember who it was that Fanny Hill married (R. 21), despite the fact that the initial separation and ultimate reunion of Fanny and Charles is a central theme in the novel. Either this is a memory lapse that again bespeaks involvement rather than objectivity, or it is evidence that the witness had not read the whole book.

[17] ". . . We think, in the light of the decisions reviewed above, that the First Amendment protects material which has value because of ideas, news, or artistic, literary, or scientific attributes. . . ." (345 Mass. 11, 19, 184 N. E. 2d 328, 333).

Nor does it involve a situation where evidence *pro* and *contra* must be weighed. The testimony of the Attorney General's one witness (R. 10-21), described above at pages 4 and 24-25 (footnote 16), cannot reasonably be said to create a conflict with the evidence going to show the value of the book.

The opinion below mentions, in slighting, advocates' tones, that the book "contains a moral" (206 N. E. 2d 403, 406; R. 124). But the critics treated Fanny's thoughts about life and love as seriously meant, and entitled to serious reading. Pritchett puts it this way: "She is unrepentant in pleasure or lust; but she truthfully perceives —and that, I believe, without the sort of hypocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical, spiritual pleasure in love" (R. 28). Similarly, Brophy finds Fanny's final statement to be "without, as she rightly claims, hypocrisy. . . ." (R. 36). The witnesses gave more detailed testimony to the same general effect—that the observations, ideas and moral conclusions of the book are thoughtful, substantial and perceptive (R. 42-43, 45, 46, 55, 64, 67, 87-88, 92-93).

Referring to the expert testimony, the majority said, in passing "much of [it] was strained" (206 N. E. 2d 403, 406; R. 124). We respectfully but emphatically disagree. The testimony was careful and specific. The witnesses were not indulging in flights of critical fancy. What they had to say made sense on direct examination, and continued to make sense under persistent cross-examination. The witnesses are men of high academic standing, who would be most unlikely to jeopardize that standing by giving sworn testimony that might return to embarrass them. It is one thing to assert that a book is "not obscene" or "not pornographic". These are conclusory statements that can always be defended on semantic grounds. It is quite another thing for a professional critic or teacher to analyze a book, to give detailed testimony about what values he sees in it, and to appraise the book in relation to other works of litera-

ture. Even if a single individual might conceivably be so irrational as to do what the majority below suggests, it is not conceivable that the entire roster of these distinguished men should be willing to give disingenuous, distorted or otherwise "strained" testimony.[18]

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[18] Although it is not part of this record, we invite the Court's attention to matters of record in the two other cases in which the Publisher defended *Memoirs (Larkin* v. *G. P. Putnam's Sons,* N. Y. Co. Clerk's Index No. 41231-63, Supreme Court, New York County, August, 1963; *G. P. Putnam's Sons* v. *Calissi,* Docket No. C-3070-62, Superior Court of New Jersey, Chancery Division, Bergen County, June, 1964). Only three of the witnesses (excluding the Publisher's president) appeared at more than one of the three trials. The following testified in the New York and New Jersey trials: J. Donald Adams, for many years editor-in-chief of *The New York Times Sunday Book Review;* Eric Bentley, critic, dramatist and Professor of Dramatic Literature at Columbia; Louis Untermeyer, poet, critic and anthologist; Eliot Fremont-Smith, book review editor and regular critic for *The New York Times;* Clarence Decker, Professor of Literature and Vice-President at Fairleigh Dickinson; John McCormick, Chairman of the Department of Comparative Literature at Rutgers; John Hollander, Assistant Professor of English at Yale; Gerald Willen, Assistant Professor of English at Hunter College; Paul Fussell, Associate Professor of English and Director of English Graduate Studies at Rutgers; and David Burrows, Assistant Professor of English at Douglas College For Women.

In the one case that involved a motion for preliminary injunction *(Larkin* v. *G. P. Putnam's Sons),* the following submitted affidavits or letters attesting the merit of the work: the critics Alfred Kazin, Maxwell Geismar, Dwight MacDonald and Edward B. Garside, John Gassner, Sterling Professor at Yale, Barbara Epstein, co-editor of *The New York Review of Books,* and Norman Podhoretz, editor-in-chief of *Commentary* magazine.

It thus appears that in each locality where the book was called into question there were numbers of highly qualified critics and scholars who regarded the book as one of substantial value, and were willing to say so, under oath, in court. If they represented only a minority of critical opinion, it is strange that no member of the hypothetical majority (with the dubious exception of Dr. Collins) would have appeared to give contrary testimony at any of the three trials. And even if they represented only a minority, the existence of a minority of such substance, holding such views, would establish the social importance of the book.

Moreover, there was corroboration for what the witnesses said in the published essays of Pritchett, Adams and Brophy, and in the introduction by Peter Quennell. Celebrated critics thus submitted to the judgment of the literary world opinions very similar to those which the witnesses submitted to the judgment of the court. It is not realistic to suppose that when V. S. Pritchett writes that *Memoirs*

> "has its place in the history of literature, not in the history of smut" (R. 28),

or when he writes that

> "Cleland is good about sex because he is good about words. Elegance, energy, and kindness he conveyed." (R. 31).

he does not mean what he says. Nor is it realistic to suppose that any other of the witnesses or writers was offering an unprofessional opinion, one that might diminish his reputation as scholar or critic.

5. THE HARD-CORE PORNOGRAPHY TEST LEADS TO THE SAME RESULT.

If "hard-core pornography" is taken as the definition of what may be constitutionally suppressed under anti-obscenity legislation, the result in the present case is the same. Analytically, the concept appears to involve all three standards discussed above. It would seem to be a combination of morbidity, extreme offensiveness and utter worthlessness that denotes hard-core pornography. No such syndrome can be attributed to *Memoirs.* If the concept is considered not analytically but empirically, there is a striking contrast between *Memoirs* and publications that have been held to be obscene: see *People* v. *Finkelstein,* 11 N. Y. 2d 300, 183 N. E. 2d 661, cert. den. 371 U. S. 863; *Burke* v. *Kingsley Books, Inc.,* 208 Misc. 150, 142 N. Y. S. 2d 735, affd. (on another issue) *sub nom. Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436; *People* v. *Sikora,* 32 Ill. 2d 260, 204 N. E. 2d 768. And comparison with publications held not obscene

appears to exclude the possibility that *Memoirs* might be deemed hard-core pornography; we refer to the various materials in the *per curiam* reversals that followed *Roth*, to the contents of the magazine in *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681 (see the description at 9 N. Y. 2d 578, 594), to the illustrated perversions of *United States* v. *Klaw*, 350 F. 2d 155 (2 Cir.), and to the rough and shocking *Tropic of Cancer* of *Grove Press* v. *Gerstein*, 378 U. S. 577.

6. BOOKS HAVE A SPECIAL PLACE AMONG THE FORMS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT AGAINST SUPPRESSION UNDER ANTI-OBSCENITY STATUTES.

It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. See *Freedman* v. *Maryland*, 380 U. S. 51, 60-61. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theatre audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems.[19] Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication—the sound truck, for example, or the advertising poster in a train or bus—make us their captive. Television, the great new medium of our time, presents both aspects: its communications are usually re-

[19] The familiar hypothetical from another area of restraint—shouting "Fire!" in a theatre—would hardly present a problem if there were only one other person in the theatre.

ceived in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement, or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there

are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value—"literary or scientific or artistic". The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that, in a case where value is proven, a book may not be destroyed. That is the case before the Court.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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UNITED STATES CONSTITUTION, AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS, CHAPTER 272.

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SECTION 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. [As amended by St. 1960, c. 311.]

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or education character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowledge as to the obscenity, indecency or impurity of the book. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book. [As inserted by St. 1945, c. 278 § 1.]